

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.
Before the Honorable Paul J. Luckern

In the Matter of

CERTAIN RUBBER ANTIDEGRADANTS,
COMPONENTS THEREOF, AND PRODUCTS
CONTAINING SAME

Inv. No. 337-TA-533

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**RESPONDENT KOREA KUMHO PETROCHEMICAL CO., LTD.'S
CONTINGENT PETITION FOR REVIEW OF THE INITIAL DETERMINATION**

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Respondent Korea Kumho Petrochemical Co., Ltd. ("KKPC") respectfully submits this Contingent Petition for Review of the Final Initial and Recommended Determinations ("Initial Determination") in the captioned investigation pursuant to 19 C.F.R. § 210.43(b)(3). KKPC does not seek review of the ALJ's Initial Determination. KKPC's petition is contingent upon the granting of any other petition for review or upon the Commission's reviewing the ALJ's Initial Determination on its own motion pursuant to 19 C.F.R. § 210.44.

I. BACKGROUND

This investigation is based upon allegations by Flexsys America LP ("Flexsys") of patent infringement by KKPC, Sinorgchem Co., Shandong ("Sinorgchem"), Sovereign Chemical Company ("Sovereign"), Vilax Corporation ("Vilax"), and Stolt-Nielsen Transportation Group Ltd. ("Stolt-Nielsen") regarding the sale of certain rubber antidegradants, components thereof and products containing same.

This investigation was instituted on March 23, 2005, pursuant to Section 337 of the Tariff Act of 1930, as amended, to determine whether there was a violation of subsection (a)(1)(B) of Section 337 by the importation into the United States, the sale for importation, or the sale within the United States after importation of certain rubber antidegradants, components thereof and products containing same¹ due to infringement of claims of United States Patent No. 5,117,063 (the "'063 Patent"), United States Patent No. 5,608,111 (the "'111 Patent"), and United States

¹ The parties stipulated that any relief that issues in this investigation will not extend to any downstream product using 6PPD. Exhibit SX-6.

Patent No. 6,140,538² (the "'538 Patent"), and whether there exists an industry in the United States as required by subsection (a)(2) of Section 337.

The Commission named as complainant Flexsys America LP. *See* 70 Fed. Reg. 15,885 (March 29, 2005). The Commission named as respondents KKPC, Sinorgchem, Sovereign, Vilax and Stolt-Nielsen.³

A. The Patents and Claims at Issue

Generally, the '063 and the '111 Patents describe a method for producing 4-ADPA intermediates⁴ and 4-ADPA by reacting or coupling aniline and nitrobenzene with a "suitable base" in a "suitable solvent system" where there is a "controlled amount of protic material." (CX-1; CX-3.) In this investigation, Flexsys asserted claims 30 and 61 of the '063 Patent and claims 7 and 11 of the '111 Patent.⁵ All of these asserted claims include the key limitation of "controlled amount of protic material." The asserted claims of the two patents are set forth immediately below.

1. The '063 Patent

Claim 30 of the '063 Patent reads:

A method of producing 4-aminodiphenylamine (4-ADPA) comprising the steps of:

² The '538 Patent was terminated from the investigation based on Flexsys' withdrawal of that patent. *See* Order No. 27 (Initial Determination re: '538 Patent dated October 7, 2005). On November 2, 2005, the Commission determined not to review Order No. 27.

³ In separate orders, early in the investigation, Stolt-Nielsen and Vilax were terminated from the investigation. *See* Order Nos. 4, 5.

⁴ These intermediates are n-nitrosodiphenylamine ("4-NODPA" or "p-NDPA") and 4-nitrodiphenylamine ("4-NDPA").

⁵ As more fully set forth herein, Claim 61 of the '063 Patent and Claim 11 of the '111 Patent describe the additional step of reductively alkylating 4-ADPA to create 6PPD.

- (a) bringing aniline and nitrobenzene into reactive contact in a suitable solvent system;
- (b) reacting the aniline and nitrobenzene in a confined zone at a suitable temperature, and in the presence of a suitable base and *controlled amount of protic material* to produce one or more 4-ADPA intermediates; and
- (c) reducing the 4-ADPA intermediates under conditions which produce 4-ADPA.

(CX-1, col. 14, lns 17-26) (emphasis added).

Claim 61 of the '063 Patent repeats steps (a)-(c) of claim 30 and adds step (d): "reductively alkylating the 4-ADPA of step (c)" to make alkylated p-phenylenediamines. (CX-1, col. 15, lns 34-46.)

2. The '111 Patent

Claim 7 of the '111 Patent states:

A method of producing 4-aminodiphenylamine (4-ADPA) or substituted derivatives thereof comprising:

- (a) bringing aniline or substituted aniline derivatives and nitrobenzene into reactive contact in a suitable solvent system;
- (b) reacting the aniline or substituted aniline derivatives and nitrobenzene in a confined zone at a suitable temperature, and in the presence of a suitable base and *controlled amount of protic material* to produce one or more 4-ADPA intermediates; and
- (c) reducing the 4-ADPA intermediates under conditions which produce 4-ADPA or substituted derivatives thereof wherein the amount of protic material in step (b) is controlled by the continuous distillation of said protic material.

(CX-3, col. 20 ln 63 - col. 21, ln 11) (emphasis added).

Claim 11 of the '111 Patent repeats steps (a)-(c) of Claim 7 and adds the step of reductively alkylating the 4-ADPA or substituted derivatives of step (c). (CX-3, col. 21, lns 37-53.) All of the asserted claims require that the amount of protic material be controlled during the

reaction of aniline and nitrobenzene in the presence of a suitable base, a suitable solvent, and a suitable temperature. (CX-1; CX-3.)

B. The Initial Determination

On February 17, 2006, Administrative Law Judge ("ALJ") Paul J. Luckern issued his Initial Determination ("ID") in this investigation. In the ID, the ALJ made the following determinations:

1. The Commission has *in rem* jurisdiction and *in personam* jurisdiction.
2. There has been importation of certain accused rubber antidegradants, components thereof, and products containing same which are the subject of the alleged unfair trade allegations.
3. An industry does exist in the United States, as required by subsection (a)(2) of section 337, that exploits certain rubber antidegradants, components thereof, and products containing same that are covered by the '063 Patent and the '111 Patent.
4. The accused process of respondent Sinorgchem infringes the asserted claims.
5. The asserted claims of the '063 Patent and the '111 Patent are not invalid.
6. There is a violation of section 337 by respondents Sinorgchem and Sovereign.
7. There is no violation of section 337 by respondent KKPC.
8. The record supports issuance of limited exclusion orders against Sinorgchem and Sovereign.
9. The record does not support imposition of any bond during the Presidential review period.

II. STANDARD OF REVIEW

The Commission derives its authority to review initial determinations from section 557(b) of the Administrative Procedure Act (the "Act"). In pertinent part, the Act provides that:

When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on the motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which

it would have in making the initial decision except as it may limit the issues on notice or by rule.

5 U.S.C. § 557(b) (2000).

Rule 210.43(b)(1) establishes the standards that the Commission employs when considering whether to review an initial determination pursuant to the Act. Review is appropriate where:

- (i) A finding or conclusion of material fact is clearly erroneous;
- (ii) A legal conclusion is erroneous, without governing precedent, rule or law, or constitutes an abuse of discretion; or
- (iii) The ID is one affecting Commission policy.

19 C.F.R. § 210.43(b)(1)(i)-(iii). The Commission will grant review "if it appears that an error or abuse of the type described in paragraph (b)(1) of this section is present" 19 C.F.R. § 210.43(d)(2).

KKPC does not seek a review of the ID. If the Commission is inclined to review, however, then KKPC respectfully requests review of the following issues:

1. Whether the ALJ erred in failing to consider KKPC's noninfringing P1 and P2 processes for producing 4-ADPA and 6PPD.
2. Whether the ALJ made reversible errors of law and fact in determining that KKPC does not hold a license to practice the processes of the patents-in-suit and that Flexsys is not estopped from enforcing the patents-in-suit against KKPC.
3. Whether the ALJ erred in interpreting the "controlled amount of protic material" limitation present in all the asserted claims of the '063 and '111 patents.
4. Whether the ALJ erred in determining that the asserted claims of the '063 and '111 patents are not indefinite.
5. Whether the ALJ erred in determining that the asserted claims of the '063 and '111 patents are non-obvious under 35 U.S.C. § 103.

III. ARGUMENT AND AUTHORITIES

A. The ALJ Erred in Failing to Consider KKPC's Noninfringing P1 and P2 Processes for Producing 4-ADPA and 6PPD

It is longstanding Commission policy that when presented during the course of an investigation with a redesigned product that arguably falls within the scope of the notice of investigation, the ALJ should assume jurisdiction and determine whether importation of the redesigned product constitutes a violation of Section 337. *Certain Flash Memory Circuits and Products Containing Same*, Inv. No. 337-TA-382, Comm'n Op. on the Issues under Review and on Remedy, The Public Interest, and Bonding at 19 (June 26, 1997). The U.S. Court of Appeals has made it clear that, under such circumstances, the proper course is for the Commission to assume jurisdiction and render a determination. *Amgen, Inc. v. U.S. Int'l Trade Comm'n*, 902 F.2d 1532, 1536 (Fed. Cir. 1990). The ALJ's decision to view Flexsys' Motion to Strike Testimony and Exhibits Regarding Whether KKPC's P1 and P2 Processes Infringe U.S. Patent Nos. 5,117,063 and 5,608,111 ("Motion to Strike") as "tantamount to a motion to terminate" directly contravenes this explicit policy. (ID at 96.)

The Commission, by its Notice of Investigation, defines and controls the scope of the investigation. *Id.*; *Certain Polyethylene Terephthalate Yarn and Products Containing Same*, Inv. No. 337-TA-457, Commission Notice (Dec. 18, 2001). Neither the complainant itself nor the allegations in the complaint may alter or interfere with this established province of the Commission. A complainant such as Flexsys cannot change the scope of the investigation simply by amending its Pre-Hearing Statement "withdrawing" any allegations as to the P1 and P2 processes.⁶ Absent direct Commission action amending the Notice of Investigation, the scope

⁶ Flexsys did not move to amend the Notice of Investigation pursuant to Commission Rule 210.14(b) nor did it move to terminate pursuant to Commission Rule 210.21(a).

of the investigation remains unchanged. For this reason, respondents have the right to bring redesigned products before the Commission as a part of the original investigation for a determination.

In addition, it should be noted that it was KKPC, not Flexsys, who alleged that the P1 and P2 processes might be within the scope of the Notice of Investigation and requested a determination as to violation. In other words, it is KKPC seeking a determination from the Commission, not Flexsys. Flexsys made no allegation as to the P1 and P2 processes that it could withdraw and, therefore, had no ability to do so. Flexsys made the strategic decision to disregard the P1 and P2 processes in this investigation. It did so at its own peril. Its belated efforts to "withdraw" allegations that it had no power to withdraw should be deemed ineffective.

As set forth in the various pleadings on this issue, KKPC put Flexsys on notice of the P1 and P2 processes in June 2005, and provided, at Flexsys' request, substantial discovery regarding those processes. This discovery included interrogatory responses and documents describing in detail the P1 and P2 processes, documents regarding the importation of products made according to P1 and P2 processes and the deposition of a KKPC corporate representative in response to a Notice of Examination specifically seeking testimony regarding the P1 and P2 processes. KKPC also presented substantial evidence at the hearing demonstrating that products manufactured using the P1 and P2 processes were imported and that these processes do not infringe the asserted patents. (*See* Kim, Tr. 1795:20 – 1796:17; *see also* JX-27C, Kim Dep. 28, 42-43, 63, 66-68 and 89; RX-500; RX-593C; RX-596; RX-600C; and RPX-1 through RPX-4.) The issue, therefore, is ripe for decision. Flexsys, however, would have the Commission disregard the P1 and P2 processes not because Flexsys believes that the processes do not infringe the patents at issue, but rather because Flexsys does not want to be inconvenienced with addressing them as a

part of this investigation. (See Nov. 3, 2005, Telephone Conference Tr. at 98:3-8.) Convenience of the complainant, however, is not a reason for the Commission to abrogate its responsibility to investigate any potential violations of Section 337 that fall within the scope of the investigation as defined by the Notice of Investigation.

Commission precedent is clear that respondents have the right to bring into the investigation redesigned or newly designed products that fall within the scope of an investigation. When presented with evidence of new designs or new processes that are alleged not to infringe the asserted patent, a complainant is required by the Commission to be prepared to address these new designs or new processes at the hearing and present evidence of infringement. Determinations have been made as to such products in several investigations, including *Flash Memory Circuits, Certain Set-Top Boxes and Components Thereof*, Inv. No. 337-TA-454, and *Certain Integrated Circuits, Processes for Making Same, and Products Containing Same*, Inv. No. 337-TA-450. KKPC seeks the same treatment that the Commission has consistently provided to respondents who have imported redesigned products in previous investigations.

The Commission has consistently held that the ALJ and/or the Commission should address redesigned products that fall within the scope of the Notice of Investigation. The failure to do so in this investigation is directly contrary to this clearly established policy. Moreover, equity demands that, after KKPC has gone to the expense of developing new processes, providing substantial discovery, and presenting evidence at the Hearing, Flexsys not be permitted to avoid a decision as to the P1 and P2 processes by simply stating that it is not accusing these processes of infringement *at this time*. Absent a Commission determination as to the P1 and P2 processes, KKPC unnecessarily faces the distinct possibility of another Section 337 investigation

either in the form of an enforcement proceeding or another violation investigation. Finally, in light of the Commission's control over the scope of the remedy, and due to the *in rem* nature of 337 remedies, should a limited exclusion order issue against KKPC's products, products manufactured by the P1 and/or P2 processes could easily and improperly be excluded. The issue of whether the importation of 6PPD made using the P1 and P2 processes constitutes a violation of Section 337 is ripe for decision. KKPC respectfully requests that the Commission assume jurisdiction as required by the U.S. Court of Appeals for the Federal Circuit in *Amgen, Inc. v. U.S. Int'l Trade Comm'n*, 902 F.2d 1532 (Fed. Cir. 1990), and issue a determination as to these processes.

B. The ALJ Committed Reversible Errors of Law and Fact in Finding That KKPC Does Not Hold a License and That Flexsys Is Not Estopped from Enforcing Its Patents Against KKPC

Should the Commission decide to review the Initial Determination, KKPC requests the Commission to review the ALJ's determination that KKPC does not hold a license barring Complainant's claims and that Complainant is not estopped from enforcing its patents against KKPC. The ALJ committed several errors of law and material fact in determining that KKPC's manufacturing processes are not protected by licenses it received from Flexsys. Reversal of any one of these errors requires a finding that KKPC is not an infringer.

KKPC's license defense arises from a joint venture it entered into with Flexsys' predecessor, Monsanto. As part of the joint venture (which formed a company known as Kumho Monsanto Inc., "KMI"), Monsanto and KMI signed a Technology and Licensing Agreement ("TALA") which granted KMI (and KKPC as KMI's successor) a license to certain technology developed or to be developed by Monsanto. The ALJ's opinion regarding the scope of the license granted under the TALA contains reversible errors of material fact and law. For example, despite the concurrence of the Staff, the Initial Determination treats as "irrelevant"

undisputed evidence that KKPC held a license to continue making 6PPD from 4-ADPA from any source. In addition, the Initial Determination fails to address anywhere the undisputed evidence that the TALA granted KKPC a license under Flexsys' Korean patent. Where the ALJ did undertake to interpret the TALA and its scope, his opinion ignored or misconstrued black letter law and avoided undisputed evidence.

Finally, the Initial Determination failed to correctly apply the doctrine of promissory estoppel; instead, the ALJ committed a clear error of law by requiring a writing signed by Flexsys in order to apply estoppel, in addition to erroneously finding that there was no evidence of reliance by KKPC. For these reasons, as fully outlined below, in the event the Commission should elect to review the Initial Determination, the ALJ's determination on these issues should be reviewed as well.

1. The ALJ's Ruling That It Is "Irrelevant" Whether KKPC Has a License to Produce 6PPD from 4-ADPA from any Source Is Erroneous as a Matter of Law

In a footnote at the very conclusion of the Initial Determination regarding KKPC's license and estoppel defense, the ALJ included a finding that "the issue of whether KKPC has any right to convert 4-ADPA obtained from any source into 6PPD using the same processes previously used by KMI is *irrelevant* to complainant's allegations of infringement . . ." (ID, p.130, fn. 40) (emphasis added). This ruling is erroneous as a matter of law. It is undisputed that, since 1995, KKPC has produced *only* 6PPD from 4-ADPA obtained from third parties (RFF 9.103); thus, KKPC can only be liable as an infringer if its 6PPD process infringes. It is undisputed that KKPC's current process for alkylating 4-ADPA remains identical to KMI's process during the term of the TALA. (SFF 245.) As agreed to by the Staff, as KMI's successor, KKPC holds a license under the TALA to perform reductive alkylation on 4-ADPA from any source to produce 6PPD. (SFF 475, 477.) Contrary to the ALJ's finding of irrelevance, KKPC's license right to

produce 6PPD using the same process as KMI is not only highly pertinent, it is dispositive of Complainant's infringement claims. It was an error of law for the ALJ to hold that KKPC's license to produce 6PPD from any source of 4-ADPA was irrelevant. A license would be an absolute defense to Flexsys' claim of infringement. *See, e.g., McCoy v. Mitsuboshi Cutlery*, 67 F.3d 917, 920 (Fed. Cir. 1995).

2. The ALJ Ignored Fundamental Precepts of Contract Interpretation and the Unambiguous and Uncontradicted Conduct of the Parties in Determining That KKPC Did Not Have a License to the 4-ADPA Technology in Question

KKPC had licenses to practice the patented 4-ADPA processes on two separate grounds: 1) KMI (and KKPC as its successor) had a license to Flexsys' Korean patent that covered the PPD2 technology; and 2) Flexsys was obligated to license the PPD2 process because it was improvement technology that was commercialized during the term of the TALA. The ALJ committed error as a matter of law in failing to enforce KKPC's license under the Korean patent and also in determining that the PPD2 process, the same process at issue in this investigation, was not "improvement" technology "commercialized" during the term of the TALA and thus within the scope of the license grant of the TALA. Either of these grounds would provide KKPC with a complete defense to Flexsys' claim.

The ALJ first failed to act upon the undisputed evidence establishing that KKPC holds a license under Flexsys' Korean patent covering the PPD2 process. In its Rebuttal Findings of Fact, Flexsys *conceded* that Article 6.03 of the TALA granted a license to KMI to the Korean patent that issued on the PPD2 process. (CORFF 9.200.) Nevertheless, the ALJ failed to enforce KKPC's rights on this uncontradicted record or on the unrebutted evidence that KKPC legally succeeded to KMI's rights under the TALA. The ALJ's failure to do so is a clear error of law as such a license would be an absolute defense to a claim of infringement.

In addition, the ALJ violated established precepts of contract interpretation in determining that the PPD2 process was not an "improvement" covered by the TALA. Rather than applying the standard rules of contract interpretation – which require, at a minimum, an inquiry into both what the parties intended and what their actual conduct demonstrates about such intentions – the ALJ erroneously substituted his own judgment of what the parties intended. For example, the ALJ found that PPD2 was not an "improvement" covered by the TALA, but rather, "was a completely different process." (ID, p. 128.) He offered neither an interpretation of what the term "improvement" was intended by the parties to mean nor any finding as to whether that term is ambiguous as used in the TALA.⁷ The ALJ compounded this error by failing to consider proper parol evidence. Instead of relying on the actual contemporaneous conduct and statements of the parties in deciding if the PPD2 process was considered by the parties to be an improvement or even the dictionary definition of what is an "improvement," the ALJ relied only on the self-serving statements of a Flexsys witness made at trial – years after actual conduct to the contrary – to the effect that PPD2, in his opinion, was not an "improvement."⁸

For instance, the undisputed factual record shows that, during the course of the KMI joint venture, the parties understood that the PPD2 process was an "improvement" to existing technology. In contemporaneous documents created while the TALA was still in effect, Monsanto expressly acknowledged in writing to KMI officials that the PPD2 process was an "improvement" to its existing process. (RFF 9.84.) As further corroboration that Monsanto

⁷ As testified to by Flexsys' Korean law expert, if a contract term is deemed ambiguous, Korean courts are entitled to consider a variety of extrinsic evidence, including the circumstances behind the entering of the contract, the aims and objectives of the parties and dictionary definitions. (Choi Tr. 154:3-15, 167:15-168:3.)

⁸ Indeed, the ALJ also failed to acknowledge that this testimony was contradicted by the testimony of Michael Schade, a *former* Technology Manager of Flexsys, who agreed at his deposition that PPD2 was an improvement to Monsanto/Flexsys' prior PNCB process. (JX 31-C, 26:19-27:19.)

understood the PPD2 process was an improvement to be shared with KMI under the TALA, Monsanto gave a tour of the PPD2/Queenly plant to KKPC Manager S.K. Lim in 1992 during the term of the TALA. (RFF 9.68.) It is undisputed that under 4.03 of the TALA, such tours were only for the purpose of sharing information on improvements to existing technology. (RFF 9.34, Ex. 506-C.) It makes no sense for Monsanto to invite KMI's management to inspect its PPD2 plant if Monsanto did not understand that it would be sharing such "improved" technology with KMI.

In addition to failing to conclude that the PPD2 process was an "improvement" under the TALA, the ALJ also erroneously concluded that the PPD2 process had not been commercialized during the term of the TALA. Once again, the ALJ provided no analysis of the term "commercialize," a term not defined in the TALA, nor what the parties intended in using that term; instead, the ALJ simply and summarily concluded that the PPD2 process was commercialized after the TALA expired. As acknowledged by Flexsys' own Korean law expert, the definition of the term "commercialize" – "to apply methods of business for profit" – is relevant to interpreting the TALA; this definition is not even addressed by ALJ. (RFF 9.43.3, 9.43.4) Likewise, the evidence in the record (of production at the Queenly Plant and at Antwerp prior to October 31, 1997) is fully consistent with the definition of the term "commercialize". The ALJ, however, failed to interpret the term "commercialize" and then failed to apply any of this evidence to the term as interpreted, thus committing errors of law. Because the unambiguous evidence establishes that PPD2 technology was commercialized during the term of the TALA, as that term is properly interpreted, KKPC has a license to the PPD2 process under the TALA as "continuing know how."

3. The ALJ Failed to Correctly Apply the Doctrine of Promissory Estoppel

As testified to by both parties' Korean law experts at the hearing, there is a principle of good faith and trust, similar to the principal of estoppel, under Korean law.⁹ (CORFF 9.212.)¹⁰ Under the principle of good faith and trust, if one party to a contract behaves in a certain way and the other party reasonably relies on that conduct, the first party cannot thereafter take a position that is contrary to its earlier conduct. (Choi Tr. 156:13-157:1.)

Following the fire at KMI's 4-ADPA plant in 1995, it is undisputed that Monsanto made assurances to KMI to induce it not to rebuild the plant. (RFF 9.97, 9.99, 9.100, 9.101.) It is also undisputed that KMI, relying on such assurances, did not reconstruct its existing 4-ADPA plant, never resumed production of 4-ADPA, and relied on Monsanto as its primary source of 4-ADPA and as a source of PPD2 technology. (RFF 9.95, 9.96, 9.97, 9.98, 9.101, 9.102.) Under the principles of good faith and trust, Monsanto was bound to convey the PPD2 technology to KMI. (Park Tr. 1709:6-1710:24.) It would be a violation of the Korean principles of good faith and trust for Flexsys to deny KKPC the right to the technology that should have been conveyed as promised.

The ALJ denied KKPC's estoppel argument due to a fundamental error of law. The ALJ held that because there was no writing memorializing Monsanto's promise, there could be no promissory estoppel. But a writing is not an element of a promissory estoppel claim or a claim

⁹ The doctrine of promissory estoppel under U.S. law is stated as: "A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee . . . and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." *Restatement (Second) Contracts*, § 90 (1981).

¹⁰ The principle of good faith and trust is rooted in Article 2 of the Korean Civil Code. (CORFF 9.213.)

under good faith and trust. *See Restatement (Second) of Contracts*, § 139 (1981). The ALJ's failure to find promissory estoppel is thus erroneous as a matter of law.

The ALJ also committed clear errors of material fact in determining that KMI did not rely on Monsanto's promise. The fact that KMI purchased some 4-ADPA from Nanjing Chemical Company is proof of reliance, not proof of failure to rely, as the ALJ concludes. KMI was forced to purchase 4-ADPA from a third party precisely because it relied on Monsanto's failed promises and did not rebuild its own 4-ADPA plant. Furthermore, although KMI attempted to re-start its 4-ADPA plant, it is undisputed that KMI never undertook full-scale reconstruction and never obtained production of commercial 4-ADPA. Thus, the ALJ's finding of material fact in this regard is clearly erroneous.

**C. The ALJ Erred in His Rulings on Claim Construction,
 Indefiniteness and Obviousness**

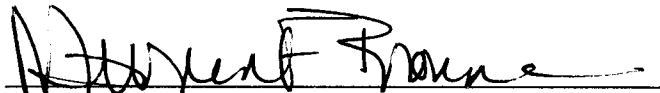
To the extent any issues in the Initial Determination are reviewed, KKPC also seeks review of the ALJ's rulings in construing the term "controlled amount of protic material," in determining that the asserted claims of the '063 and '111 patents are not indefinite, and in finding the patents non-obvious in light of the prior art. In the interest of brevity, KKPC incorporates by reference herein and adopts the arguments asserted by Sinorgchem in its Petition for Review.

IV. CONCLUSION

The ALJ correctly determined that there is no violation of Section 337 as to KKPC, and KKPC does not seek review of this decision. If, however, the Commission decides to review the Initial Determination, KKPC respectfully petitions the Commission to review those portions of the Initial Determination noted herein.

DATED: March 3, 2006

Respectfully submitted,



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TIR700306

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **RESPONDENT KOREA KUMHO PETROCHEMICAL CO., LTD.'S CONTINGENT PETITION FOR REVIEW OF THE INITIAL DETERMINATION (PUBLIC)** was served as indicated, to the parties listed below, this 3rd day of March 2006:

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500 E Street, S.W., Room 112A
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(VIA HAND DELIVERY – Original + 12 copies)

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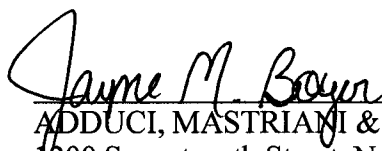
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